IN THE SUPREME COURT IN AND FOR THE STATE OF MONTANA

Case No. DA 10-0152

KIMBALL LELAND FEHRS and DEBRA FEHRS,

Plaintiffs/Appellees,

vs.

MICHAEL C. SCHMIDT,

Defendant/Appellant.

OPENING BRIEF

Appealed from the Eleventh Judicial District of the
State of Montana, in and for the County of Flathead

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Did the District Court err in ruling that a non-possessory prescriptive easement existed for the for a yard, a garage and the storage of materials and junk, and not a possessory adverse possession of property enclosed by the yard, garage and storage?

STATEMENT OF THE CASE

Plaintiffs/Respondents, Kimball Leland Fehrs and Debra Fehrs, hereinafter "Fehrs" brought suit against Defendant/Appellant, Michael C. Schmidt, hereinafter "Schmidt" seeking to quiet title by adverse possession to a strip of real property 50' x 120' owned by Schmidt located in Lincoln County upon which land Fehers had constructed a garage, a yard which is enclosed by shrubs, trees and yard "ornaments," and stored all matter of personal property to the exclusion of Schmidt. In the alternative, Fehrs plead for a prescriptive easement to maintain their garage, yard and storage upon Schmidt's property. Schmidt counterclaimed for trespass upon Schmidt's property. A bench trial was held on February 10, 2010 and the district court entered its Findings of Fact, Conclusions of Law and Judgment on February 11, 2010. (See Appendix . J. hereinafter "Judgment")[1]. The court denied Feher's claims

[1]The appendix consists of Exhibits A thru H which are trial exhibits entered into evidence by the parties; Exhibit J is the district court's Findings of Fact, Conclusions of Law and Order.

of adverse possession, and quiet title. The court granted Fehers' claim for a prescriptive easement to use a strip of Defendant's property 30 feet wide running across the shared boundary to maintain a garage, a yard and storage. The court denied Schmidt's claim for trespass. Schmidt appeals from the order in favor of Fehrs determining that Fehers acquired a prescriptive easement across a strip of Schmidt's property to maintain a garage, a yard and storage.

STATEMENT OF FACTS

Fehers and Schmidt own real property in Lincoln County on the outskirts of Libby. (Appen. J. page 2, line 1.; Appen. A.) Fehers property is a small triangular parcel, .127 acres in size. (See Append J. page 2, para 2). Fehrs property, is contiguous to the Schmidt property, consisting of 4.980 acres, by virtue of the entire northern boundary of Fehrs property being contiguous to a portion of the southern boundary of the Schmidt property. (Appen. A.). This contiguous boundary line will be referred to as the "common boundary line" of the two properties. The Fehrs property borders Forest Service land to the west and a county road to the east. (Appen. A; Appen J. para 2).

The following are findings of fact that were not contested by either party and are taken from the district court's findings as background to the issue that Schmidt appeals. (Appen J):

Fehrs purchased their property in the early 1980s...When they purchased property it was bare land. They moved a mobile home onto the property and parked it across the common boundary line on Schmidt's property. Subsequently, Fehrs moved the mobile home off the property and built a house within the boundary of their property. Since moving the mobile home off of the Schmidt property, they have continued to use the area where the mobile home had been parked as a yard, planting trees, and flowers, and mowing grass. There are also yard ornaments [around the edge of the yard such] as planters, old wheel barrows, old farm equipment etc. (Appen B, E, I, J).

Schmidt purchased his property in the 1990's.... The first time Schmidt encountered Kimball Fehrs, Fehrs was in the process of building a garage..Schmidt told Fehrs he believed that Fehrs was building the garage on Schmidt's property. Fehrs did not halt construction and the garage...was completed.

For many years, Schmidt believed that Fehrses were trespassing on Schmidt's property, not just with the garage, but with all kinds of building materials and junk...Animosity grew between the parties. Schmidt has obtained two orders of protection against the Fehrses and has made scores of calls to the sheriff's office complaining about Fehrses encroachment onto his property.

After years of contentioin,, in 2007, Schmidt had his property surveyed, and the survey confirmed what he had believed all along, that the Fehrses had been encroaching all along...Specifically, the garage that Fehrs had built is located 20.56' onto Schmidt's property. The yard where the Fehrses first parked their mobile home and where they have planted trees and flowers and placed "yard ornaments" is Schmidt's property. Behind the garage and on the other side of the garage, away from the house, the Fehrses have now made it a practice of parking vehicles and storing building materials and junk on the ground.

The Fehrs built in garage in 1995. (Tr. 12:2).[2] The garage was built across the

[2]Trial Transcript will be abreviate Tr. Tr.12:2 indicates page 12 of the trial transcript line 2.

common boundary line as depicted on the survey completed by Schmidt and as depicted in the upper right and lower left photograph on Plaintiff's Exhibit 3. (Tr.7:12; Appen. A, C).

Additionally, Fehrs built a yard to the west of the garage which is north of the common boundary line and wholly on Schmidt's property as depicted in Plaintiff's Exhibit 2. (Tr. 33:14, 54:23-56:1, 56:8-57:14; Appen. B). Defendant's Exhibit B depicts the northern boundary of Fehers yard as lined with yard ornaments(Tr. 58:8-60:8; Appen.E). The yard was used by Fehrs continuously; they used it for parties, picnics and as a pet cemetery. (Tr.124:23-125:20). Fehrs planted grass, trees, flowers and surrounded the yard with yard ornaments creating a border along the entire length of the northern edge of the Schmidt property that Fehrs occupied. (Id, Tr. 118:12-118:21, 119:12, 120:10; Appen. B, E. I).

The Schmidt property behind the Fehrs garage and to the east of the garage was used as storage by Fehers to the exclusion of Schmidt. Over the years, Fehrs stored steel, wood, cars, storage containers...and as Kimball Fehers described it "just about anything you can think of." (Tr.64:7-65:8; Appen. C.).

The district court failed to note in its findings the uncontroverted fact that Fehrs possessed and occupied the Schmidt property which is in dispute to the exclusion of Schmidt. Kimball Fehrs testified that it was his intention to claim that area behind his house as his yard. (Tr. 58:7). Kimball Fehers said that he and his

wife believed the yard they installed upon Schmidt's property was theirs, and they placed obstacles [yard ornaments] all along the back of the yard with the intention to exclude Mr. Schmidt from using the area of Schmidt's property where Fehrs had built the yard.(Tr. 59:18). Kimball Fehrs further testified that he stored so much steel, wood, cars, storage containers, and other junk behind and to the east of his garage that "...when my stuff was there, no he couldn't -he wouldn't be able to use that property..." (Tr. 65:5). Debra Fehrs agreed with her husband that she had trees planted along the northen edge of the disputed property and put up all her ornaments the entire length of her northern property line to exclude Mr. Schmidt from the area north of the common boundary that was in dispute. (Tr. 126:5, 128:21-129:8; Appen. B, E, I).

Mr. Schmidt agreed with his neighbors that he was completely excluded from nearly any use of his property that his neighbors had laid claim to. He agreed that Fehrs had placed a boundary of junk/lawn ornaments all along the northern boundary of the disputed area excluding Schmidt from that portion of the property. (Tr. 112:2-113:21). He also agreed that Fehrs had stored so much junk behind the Fehrs garage and to the east of the garage Schmidt was unable to use any of the property that Fehrs had encroached upon. *Id.*

Neither of the parties dispute that the Fehrs use of Schmidt's property has been open notorious, exclusive, adverse, continuous, and uninterrupted for the statutory

five-year period. The court also found based on the testimony presented at trial that Fehrs did not pay any property taxes on the disputed area. (Appen. page 6, ¶5).

STANDARD OF REVIEW

This Court reviews the district court's findings of fact to ascertain whether they are clearly erroneous. *Brumit v. Lewis,* 202 MT 346, ¶12, 313 Mont 332, 61 P.3d 138. A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence , or if the Court's review of the record convinces the Court that a mistake has been committed. *Brumit,* ¶ 12. The Court's review of a district court's conclusion of law is whether the court's interpretation of the law is correct. *Armbrust v. York,* 2003 MT 36, ¶12, 65 P.3d 239, ¶12.

SUMMARY OF ARGUMENT

The District Court erred in its ruling that the adverse use of Schmidt's property to build a garage, plant a yard/garden and store, all manner of storage containers, building materials and junk resulted in nonpossessory prescriptive easement right in Fehrs, rather than title by adverse possession in Fehrs to the disputed strip of property. The undisputed evidence at trial showed Fehrs use of the disputed property completely dispossessed Schmidt from the use of any of the disputed property.

The evidence at trial was undisputed that the possession of the disputed property was "adverse" for the statutory period. Once the use is determined to be adverse, it is the nature of the use, to wit: "possessory" or "non-possessory" that determines the legal right derived form the adverse use is one of "title" by adverse possession or "easement" by prescription. If the use is "possessory" and, therefore, one of adverse possession , the additional requirement of the payment of real estate taxes by the adverse claimant on the land adversly possessed must be satisfied.

The district court, in denying the argument that the garage, yard and storage were a possessory use, and granting Fehrs and easement which totally dispossessed Schmidt from his property resulted in an ouster of the owner of the fee title to that land occupied by Fehrs

ARGUMENT

The District Court erred in ruling that a non-possessory prescriptive easement existed for the garage, yard and storage area, and not a possessory adverse possession of property enclosed by the yard, garage and storage area.

The district court misapprehended the effect of the uncontroverted evidence in this case when it found: (Appen. J; page 5,¶3):

> Section 70-19-410, MCA requires that to establish an adverse possession claim not founded on an instrument or judgment, the propety sought to be acquired must either be protected by a substantial enclosure, i.e., fence, or it must be "cultivated or improved."The Fehrses have not enclosed the property they are seeking to acquire through adverse possession, and they have not cultivated or improved the property in the manner required to §70-19-410(2), MCA. In *Habel v. James,* (citation omitted), the Montana Supreme Court held that the "cultivated or improved" requirement had not been satisfied by merely building a concrete retaining wall and dock on another's property.

This case is analogous *Habel v. James,*2003 MT 99, 315 Mont. 249, 68 P.3d 743. Just like the facts in *Habel*,

> "Neither party disputes that the [Feherses] use of the property has been open, notorious exclusive, adverse, continuous, and uninterrupted for the statutory five-year period. Further, it is undisputed that [Fehers] have not paid taxes on any portion of the [Schmidt] property. Rather, it is the character of the [Fehrs] use of the property which is disputed. If the use is non-possessory, than an easement interest is at issue, and [Fehrs] have undisputably demonstrated all of the elements necessary to establish a prescriptive easement. On the other hand, if the use is possessory, then adverse possession of the property is at issue, and because [Fehrs] have not paid the taxes on the property, the claim must

fail. *Id* 2003 MT at 104.

However, this Court should reverse the district court because the facts of this case are distinguishable from the facts in *Habel* in that the use of the property by Fehrs for a garage, a yard with clearly defined boundaries and storage of building materials, junk and vehicles all of which dispossessed Schmidt from any use of the contested portion of his property constitute a substantial enclosure, and/or property that was cultivated or improved, and therefore is a possessory in nature leaving Schmidt with an empty fee.

A. The District Court Erred in its ruling that the garage, the yard and storage Cannot be a "Possessory Use" Because They Do Not clearly Evidence the Characteristics of an "Enclosure" of Land?

As this Court stated in *Habel v. James,* 2003 MT at 106, a structure or fixture may constitute a substantial enclosure evidencing possession if the structure or fixture indicates boundaries of adverse occupancy in a manner which clearly demonstrates the extent of the use of the property, so the Fehrs possession of Schmidt's property through the construction of a garage, yard and storage area all with clearly defined boundaries which dispossessed Schmidt from any use of the disputed property constitutes a possessory use pursuant to §70-19-410(1). Similarly, the Supreme Court of Idaho, in the case of Hyde v. Lawson, 94 Idaho 886, 499 P.2d 1242, (1972), stated that the Idaho

statute for adverse possession requiring substantial enclosure and improvement was satisfied, wherein the Court stated, at page 1246:

> "It is true that the character of the enclosure may vary somewhat from case to case so long as it satisfies what is usual under the circumstances and indicates clearly the boundaries of the adverse possession."

Accordingly, reasoned the Supreme Court of Idaho:

> "We are of the opinion that a hedge row, shrubs, flower garden and trees maintained along the boundary line for the requisite period of time has the same effect for adverse possession imposes as would have a fence made of wood, metal or stone because the boundaries of the adverse occupancy are clearly indicated."

Further, insofar as the particular type of acts that indicate dominion of property sufficient to establish adverse possession, see, 3 AmJur2d, Adverse Possession, §19, entitled, Particular Acts of Ownership, which reads:

> "There is no general rule prescribing the particular acts of ownership which will constitute adverse possession. In determining whether particular acts of ownership indicate an adverse possession, the usual and ordinary use of similar lands by their owners should be taken into consideration. The rule requiring actual possession of property in order to acquire title thereto by adverse possession is ordinarily complied with if the particular acts of ownership by the adverse claimant are of such a nature as he would exercise over his own property and would not exercise over another's" (emphasis added)

More germane to the facts at hand, as to whether adverse possession of land can be accomplished by the enclosure by structure, see 3AmJur2d, Adverse Possession, §44,

entitled, Possession Based on Projection or Inclination of Wall, Building, or Other Structure, reads:

> "It is widely held that one who remains in continuous, open, and exclusive possession of a building or other structure of a permanent nature, which projects over the boundary line during the statutory period, in which actions to recover possession of real property may be maintained, acquires title by adverse possession to that portion of the adjoining property covered by the structure..." (emphasis added)

In further support of establishing adverse possession by structures and improvements, see 2 Corpus Juris Secondum, Adverse Possession, §36, entitled, Improvements, Sufficiency and Effect, which reads:

> "Actual possession may be denoted by the making of improvements which are permanent in their nature, are usual in the case of similar property and are such as to indicate exclusive control. Improvements sufficient to indicate possession may consist in the erection of permanent buildings or other structures on the land, i.e., extension of a retaining wall." (emphasis added)

Further, in 2 Corpus Juris Secondum, it states:

> "An enclosure may be made otherwise than by a fence when the means used to make the enclosure constitute a visible barrier. A building is an enclosure of the ground on which it stands." (emphasis added)

The acts of ownership by the adverse claimant, Fehrs, "are of such a nature as he would exercise over his own property and would not exercise over another's." It is undisputed by the parties that Fehers constructed a yard on Schmidt's property. They

planted grass, flowers, trees, and placed "yard ornaments" along the northern boundary of the disputed property. They built a permanent structure to the east of the yard which projects over the common boundary, and they stored so much personal property to the east side and rear of the garage that Schmidt was unable to use any of the disputed property. All of these activities constituted "clear boundaries of adverse possession." Fehrs use of Schmidt's property was possessory and Fehers claim for a prescriptive easement must fail.

B. The District Court erred when it found that Fehrs did not "cultivate or improve" the property.

Likewise, in the case of ***Kenne v. Bridges***, 123 Mont. 95, 208 P.2d 475(1949), the Montana Supreme Court in upholding an adverse possession via. Cultivation/improvement stated, at page 98:

> "To constitute adverse possession does not necessarily require the claimant to live upon the land or to enclose it with fences or to stand guard at all times upon its borders to oppose the entry of trespassers or hostile claimants. It is enough if the person ... maintains such possession and exercises such open dominion as ordinarily marks the conduct of owners in general in holding, managing and caring for property of like, nature and condition. It is manifest that the acts of ownership and dominion necessary to indicate adverse possession of a vacant lot need not and cannot be the same which a court or jury might think essential with respect to a lot covered with valuable improvements or upon which there is a place of residence." (Emphasis added.)

In **Kenny,** the claimant took possession of a vacant lot, cut the weeds and grass, set posts at the corners of the lot, had it surveyed and staked and graded the land level

to a piece of the claimant's adjoining property. Two years latter the claimant built on the land. This Court said that it was enough that the claimant cultivated or improved the entirety of the disputed property as is the case here.

The facts in this case are vary similar to the facts in ***Krona v. Brett***, 72 Wash.2d 535, 433 P.2d 858 (1967), at page 861, where the Washington Supreme Court held:

> "A person takes and maintains such possession and exercises such open dominion as ordinarily marks the conduct or owners in general, in holding, managing and caring for property of like nature and condition."

And, therefore, ruled the Supreme Court of Washington:

> "In the case at bar Plaintiffs mowing the lawn...considered in connection with their constructing a brick patio and maintaining a flower bed and compost heap on the disputed strip clearly constituted such possession and open dominion as ordinarily marks the conduct of owners in general in holding, managing and caring for property of like nature and condition. Considering the narrow width and confined location of the disputed strip it is difficult to conceive of what more any claimant could have done to manifest his possession and control over the property."

Fehrs maintained possession over the entire strip of disputed property like the situation in Kenny. Like the facts in **Krona**, Considering the narrow width and location of the disputed strip of property it is difficult to conceive of what more Fehrs could have doe to manifest possession and control over the property.

C. The District Court erred in granting Fehrs a prescriptive easement when the undisputed evidence showed that Schmidt was completely dispossessed from the disputed property.

The yard, garage and storage are sufficient possession to leave Schmidt with an "empty fee" to the disputed property. The Supreme Court, in the case of ***Burlingame v. Majerrison***, 204 Mont. 464, 665 P.2d 1136, in reversing the District Court, rejected a similar rationale of the District Court therein that the dominant tenant (Majerrison) had adversely used the Burlingame property for otherwise lawful purposes of "grazing, agriculture and timber harvesting" as a lawful ancillary use/servitude of the contiguous property owned by Majerrison.

The Court in ***Burlingame***, *supra*, at page 469-471, at length, distinguishes between servitudes that are attached to other land as appurtenances and are, therefore, easements, by recognizing that "while a servitude by definition may be an easement, that, nonetheless, not all servitudes are easements since not all servitudes are attached to other land is appurtenances." In particular, noted the Montana Supreme Court, 'where a prescriptive right to a servitude has the effect of leaving the owner with empty fee, the situation is not one of prescriptive right in the form of an easement, it has ripened into a claim for adverse possession".

Applying ***Burlingame*** to the District Court rationale herein, it is, likewise, error for the District Court herein to ignore the undisputed possessory nature of the yard, garage and storage area, but rather, what is controlling under ***Burlingame***, is that, if the effect of the adverse use leaves the owner with an empty fee, "the situation is not one of prescriptive right in the form of an easement", but a possessory use, and, therefore,

adverse possession.

From the factual situation in ***Burlingame***, it is clear that, even though Burlingame owned additional land, the "possessory use" by Majerrison only involved the approximate 5 acre portion of the Burlingame quarter section, said 5 acres being enclosed by a fence between the contiguous Burlingame and Majerrison parcels (*see* ***Burlingame***, *supra*, at page 467).

Under the ***Burlingame*** decision, Majerrison only "possessed" 5 acres of the Burlingame 40 acre tract. The Court in ***Burlingame*** did not require, nor even suggest, that Majerrison must "possess" all of the Burlingame 40 acre property, but rather, if the adverse use of the 5 acre portion of the Burlingame property was the subject of the possessory use and took on the "aspect of a fee", it was as to the 5 acre parcel, regardless of the remaining property of the Burlingames being unaffected by the Majerrison possessory use of the 5 acre parcel.

CONCLUSION

The District Courts determination that Fehrs acquired a prescriptive easement to maintain a yard, a garage and storage all of which dispossessed Schmidt from any use

of the disputed property is erroneous.

Fehrs use of the property is a possessory use and as a matter of law is adverse possession, but for the failure of Fehrs to pay the statutorily required property taxes.

Accordingly, the District Court should be reversed and this case remanded to the District Court for the entry of judgment quieting the fee title in Schmidt to the disputed property.

DATED this 9 day of July, 2010.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 27 of the Montana Rules of Appellate Procedure, I certify that

this Brief is printed with a proportionately spaced Tines New roman text typeface of 14 points; is double spaced; and the word count calculated by WordPerfect, is not more than 10,000 words, not averaging more than 280 words per page, excluding certificate of service and certificate of compliance.

DATED this 9 day of July, 2010.

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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on the 9 day of July, 2010, a true

and correct copy of the foregoing document was served upon the persons named below, at the addresses set out below their names, either by mailing, hand delivery, or otherwise, as indicated below.

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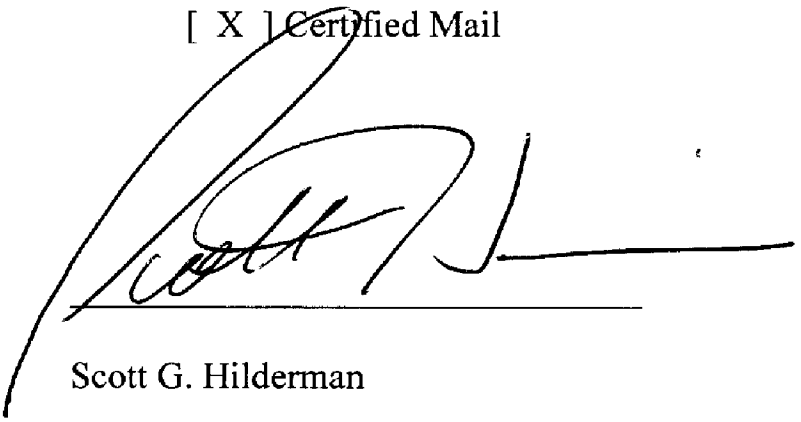

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